CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1946

No. 87

A. M. ANDERSON, RECEIVER OF NATIONAL BANK OF KENTUCKY, LOUISVILLE, KENTUCKY, PETITIONER,

vs.

IRVIN YUNGKAU, EXECUTOR OF THE ESTATE OF ALBERT YUNGKAU, DECEASED; H. E. FRANZ, EXECUTOR OF THE ESTATE OF WILLIAM R. GILPIN, DECEASED; LUCY LOGAN MASSIE, EXECUTRIX OF THE ESTATE OF WILLIAM K. MASSIE, DECEASED, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 12, 1946.

CERTIORARI GRANTED MAY 13, 1946.

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IN THE

District Court of the United States

EASTERN DISTRICT OF KENTUCKY

No. 4081

A. M. ANDERSON, RECEIVER OF THE NATIONAL BANK OF KENTUCKY, OF LOUISVILLE, KENTUCKY,

Plaintiff,

v.

JOHN L. BRADY, ET AL.,

Defendants.

STIPULATION AS TO RECORD ON APPEAL

The parties agree that the questions presented by this appeal can be determined by the Appellate Court without an examination of all the pleadings, and they further agree that the following shall be considered a statement of the case showing how the questions arose and were decided in the District Court.

This suit was filed in the United States District Court for the Eastern District of Kentucky on February 18, 1936. The allegations of the petition were identical to the allegations contained in the suit filed in the Western District of Kentucky wherein the Receiver sought to recover stock assessments from shareholders of the BancoKentucky Company, which suit is known as *Anderson* v. *Ab-*

bott, and which action was appealed to the United States Circuit Court of Appeals for the Sixth Circuit and there docketed as number 8852, and which case was ultimately appealed to the Supreme Court of the United States and decided in favor of the Receiver in the case of *Anderson* v. *Abbott,* 321 U. S. 349.

Among the persons listed as defendants at the time of the filing of the suit in the Eastern District of Kentucky, were Alexander B. Massey, Ben Williamson, James H. Kitchen, John W. Kitchen, William K. Massie, William R. Gilpin and Albert Yungkau. Each of the parties named above was served.

On July 8, 1944, the following motion was filed:

> "Now comes Irvin Yungkau, Executor of the Will of Albert Yungkau, Deceased, and moves the Court to dismiss this action so far as Albert Yungkau is concerned because the same was not revived as provided in Rule 25 within two years after the death of Albert Yungkau, Albert Yungkau having died on July 19, 1941, a citizen and resident of Boyd County, Kentucky, and no steps having been taken to revive the action against him or to substitute his executor in his place as provided in Rule 25, and in support of said motion files the order of the Boyd County Court showing the appointment of Irvin Yungkau as executor, and the affidavit of Irvin Yungkau.
>
> H. R. Dysard,
> Dysard and Dysard,
> Attorneys for Irvin Yungkau,
> Ashland, Boyd County, Kentucky."

(The order of appointment and the affidavit referred to are omitted in printing this record, the matters having been subject to stipulation which will be referred to hereinafter.)

On October 18, 1944, the following order was entered in this cause:

"This day came LeWright Browning, Esq., and suggested of record the death of the defendants Harry S. Swope, Frances H. Williamson, Rush R. Williamson, Ben Williamson, J. A. Sparks, Virginia K. Fitch, John H. McCleary, James H. Kitchen and John W. Kitchen.

"This 18th day of October, 1944.

(s) Mac Swinford,
Judge."

On October 18, 1944, the following order was entered:

"This day came Hattie C. Field, Blanche Clay, H. E. Franz, Martha Mary Moore Fagan and Iris Ramey, by counsel, and tendered an offer to file their respective affidavits suggesting the deaths of Timothy A. Field, Wade H. Clay, William R. Gilpin, Lucy Coles Moore, and Harry H. Ramey, and their respective motions to dismiss this action as to said deceased defendants. . . ."

(The balance of said order is not pertinent to this matter and is omitted.)

On said October 18, 1944, the following motion to dismiss was filed:

"Comes H. E. Franz, and moves the Court as follows: To dismiss this action as to the defendant William R. Gilpin, for the reason that William R. Gilpin died on January 23, 1937 and his personal representative was not substituted herein, nor was the action revived as to his estate, all of which more clearly appears in the affidavit of H. E. Franz, attached hereto and marked Exhibit 'A.'

(s) R. W. Davis,
Attorney for the Estate of
William R. Gilpin, Ashland,
Kentucky."

(The affidavit is not copied for the reason that the subject matter contained therein is included in a stipulation which will be referred to at a further point.)

On October 18, 1944, the following suggestion of death was filed in the United States District Court:

> "Now comes LeWright Browning, Esq., counsel of record for the defendants Harry S. Swope, Frances H. Williamson, Rush W. Williamson, Ben Williamson, James A. Sparks, Virginia K. Fitch, John H. McCleary, James H. Kitchen and John W. Kitchen, and respectfully suggests of record the death of said named defendants; that the death of each of said defendants occurred more than two years prior to this date.
>
> "This 18th day of October, 1944.
>
> (s) LeWright Browning."

On November 20, 1944, the following motion was filed:

> "Now comes Henry G. Sandifer, Executor of the Estate of Alexander B. Massey, Deceased, defendant herein, and without entering his appearance in this cause, states that Alexander B. Massey died January 24, 1941, as appears in the affidavit of J. A. Stith, funeral director of Danville, Kentucky, who conducted decedent's funeral; that within two years after decedent's death, substitution of the proper parties has not been made, and asks that this cause be dismissed as to said decedent.
>
> (s) Henry G. Sandifer,
> (s) R. T. Dickerson."

(The affidavit referred to is not copied for the reason that a stipulation on the subject matter is referred to in a subsequent filing.)

On December 14, 1944, the following stipulation was agreed to:

"Judge Marx:

"We move orally that the action against Albert Yungkau be revived against Irvin Yungkau, executor of the estate of Albert Yungkau, deceased.

"STIPULATION

"1. The above motion having been made in open court, notice of the making of such action and of the making of the motion orally is waived and Irvin Yungkau, executor of the estate of Albert Yungkau, deceased, having entered his appearance by his counsel for the purpose of opposing said motion and for no other purposes and by stipulation of the parties, it is agreed that the same may be heard on the oral motion without further notice or time.

"2. Albert Yungkau, the defendant, died July 19, 1941.

"3. His will was probated July 28, 1941, and his estate was immediately delivered to the beneficiaries of his will.

"4. Revivor is sought by motion against Irvin Yungkau, executor of the estate of Albert Yungkau, deceased.

"5. A. M. Anderson, Receiver of the National Bank of Kentucky, did not know of the death of Albert Yungkau until July 6, 1944, and after the two year period fixed by Rule 25 had expired.

"6. A. M. Anderson, as such Receiver, has brought actions against approximately five thousand defendants, and all told there were approximately six thousand shareholders of the BancoKentucky Company. These shareholders lived in all parts of the United States and some of them in foreign countries, and during the years that the actions have been in progress many of them have changed their residence from one place to another, and Mr. Anderson has had a limited staff at his disposal, and it has been impracticable and, in fact, impossible to learn of the movements and residences and even the death of defendants, and with-

out such knowledge he could not bring actions for revivor until after he learned of the death.

"7. It is agreed that Mr. Anderson has been diligent in the performance of his duty.

"8. Albert Yungkau was a resident of the City of Ashland, Boyd County, Kentucky, for more than forty years prior to his death, and was at the time of his death a resident of the City of Ashland, Boyd County, Kentucky. His picture and notice of his death were carried in the newspapers circulating in this locality and a notice of his death was also carried in the Cincinnati Enquirer.

(s) Harry Kasfir,
Nichols, Wood, Marx & Ginter,
Counsel for A. M. Anderson,
Receiver.

(s) H. R. Dysard,
Dysard and Dysard,
Counsel for Irvin Yungkau,
Executor of the Estate of Albert Yungkau, Deceased."

On December 14, 1944, the following order was entered:

"This cause coming on for hearing upon the suggestion of record of the death of the defendant, Albert Yungkau, thereupon came the plaintiff and moved the Court to revive this action against Irvin Yungkau, Executor of the Estate of Albert Yungkau, Deceased, and said personal representative having entered his appearance by his counsel for the purpose of opposing said motion and for no other purpose, and having agreed that the same could be heard on oral motion without further notice of time, and said matters having been submitted to the Court upon an agreed statement of facts, and the Court being advised,

"It is considered, ordered and adjudged that said motions for revivor be, and the same are now overruled, and that this action be and the same is now dismissed as to the defendant, Albert Yungkau.

"This 14th day of December, 1944.

(s) Mac Swinford, Judge."

On December 14, 1944, the following stipulation was filed in the United States District Court:

"Judge Marx:

"We move orally that the action against William R. Gilpin be revived against H. E. Franz, Executor of the Estate of William R. Gilpin, Deceased.

"STIPULATION

"1. The above motion having been made in open court, notice of the making of such action and of the making of the motion orally is waived and H. E. Franz, Executor of the Estate of William R. Gilpin, Deceased, having entered his appearance by his counsel for the purpose of opposing said motion and for no other purpose, and by stipulation of the parties, it is agreed that the same may be heard on the oral motion without further notice or time.

"2. William R. Gilpin, the defendant, died January 23, 1937.

"3. His will was probated February 22, 1937, and his estate is still open and undistributed.

"4. Revivor is sought by motion against H. E. Franz, Executor of the Estate of William R. Gilpin, Deceased.

"5. A. M. Anderson, Receiver of the National Bank of Kentucky, did not know of the death of William R. Gilpin until July 1944, and after the two year period fixed by Rule 25 had expired.

"6. A. M. Anderson, as such Receiver, has brought actions against approximately five thousand defend-

ants, and all told, there were approximately six thousand shareholders of the BancoKentucky Company. These shareholders lived in all parts of the United States and some of them in foreign countries, and during the years that the actions have been in progress many of them have changed their residence from one place to another, and Mr. Anderson has had a limited staff at his disposal, and it has been impracticable and, in fact, impossible to learn of the movements and residences and even the death of defendants, and without such knowledge he could not bring actions for revivor until after he learned of the death.

"7. It is agreed that Mr. Anderson has been diligent in the performance of his duty.

"8. William R. Gilpin was a resident of the City of Ashland, Boyd County, Kentucky, for more than 20 years prior to his death, and was at the time of his death a resident of the City of Ashland, Boyd County, Kentucky.

(s) Harry Kasfir,
Nichols, Wood, Marx & Ginter,
Counsel for A. M. Anderson,
Receiver, Plaintiff.

(s) R. D. Davis,
Counsel for H. E. Franz,
Executor of the Estate of
William R. Gilpin, Deceased."

On December 14, 1944, the following order was entered:

"This cause coming on for hearing upon the motion of H. E. Franz, Executor of the Estate of William R. Gilpin, Deceased, asking that this cause be dismissed as to the decedent. Thereupon came the plaintiff and moved the Court to revive this action against H. E. Franz, Executor of the Estate of William R. Gilpin,

Deceased, and said personal representative having entered his appearance by his counsel for the purpose of opposing said motion and for no other purpose, and having agreed that the same could be heard on oral motion without further notice of time, and said matter having been submitted to the Court upon an agreed statement of facts, and the Court being advised,

"It is considered, ordered and adjudged that said motion for revivor be, and the same is now overruled, and that this action be, and the same is now dismissed as to the defendant, William R. Gilpin.

"This 14th day of December, 1944.

(s) Mac Swinford, Judge."

On December 15, 1944, the following stipulation was agreed to and on December 20, 1944, the same was noted of record in the United States District Court:

"Judge Marx:

"We move orally that the action against Alexander B. Massey be revived against Henry G. Sandifer, Executor of the Estate of Alexander B. Massey, Deceased.

"STIPULATION

"1. The above motion having been made in open court, notice of the making of such action and of the making of the motion orally is waived, and Henry G. Sandifer, Executor of the Estate of Alexander B. Massey, Deceased, having entered his appearance by his counsel for the purpose of opposing said motion and for no other purpose, and by stipulation of the parties, it is agreed that the same may be heard on the oral motion without further notice or time.

"2. Alexander B. Massey, the defendant, died January 24, 1941.

"3. His will was probated February 17, 1941 and his estate is still open and undistributed.

"4. Revivor is sought by motion against Henry G. Sandifer, Executor of the Estate of Alexander B. Massey, Deceased.

"5. A. M. Anderson, Receiver of the National Bank of Kentucky, did not know of the death of Alexander B. Massey until April 24, 1944, and after the two year period fixed by Rule 25 had expired.

"6. A. M. Anderson, as such Receiver, has brought actions against approximately five thousand defendants, and all told, there were approximately six thousand shareholders of the BancoKentucky Company. These shareholders lived in all parts of the United States and some of them in foreign countries, and during the years that the actions have been in progress many of them have changed their residence from one place to another, and Mr. Anderson has had a limited staff at his disposal, and it has been impracticable and, in fact, impossible to learn of the movements and residences and even the death of defendants, and without such knowledge he could not bring actions for revivor until after he learned of the death.

"7. It is agreed that Mr. Anderson has been diligent in the performance of his duty.

"8. Alexander B. Massey was a resident of the City of Danville, Boyle County, Kentucky, for more than 18 years prior to his death, and was at the time of his death, a resident of the City of Danville, Boyle County, Kentucky.

(s) Harry Kasfir,
Nichols, Wood, Marx & Ginter,
Counsel for A. M. Anderson,
Receiver, Plaintiff.

(s) R. T. Dickerson,
Counsel for Henry G. Sandifer,
Executor of the Estate of Alexander B. Massey, Deceased."

On December 15, 1944, the following order was entered:

"This cause coming on for hearing upon the motion of Henry G. Sandifer, Executor of the Estate of Alexander B. Massey, Deceased, asking that this cause be dismissed as to the decedent. Thereupon came the plaintiff and moved the Court to revive this action against Henry G. Sandifer, Executor of the Estate of Alexander B. Massey, Deceased, and said personal representative having entered his appearance by his counsel for the purpose of opposing said motion and for no other purpose, and having agreed that the same could be heard on oral motion without further notice of time, and said matter having been submitted to the Court upon an agreed statement of facts, and the Court being advised,

"It is considered, ordered and adjudged that said motion for revivor be, and the same is now overruled, and that this action be, and the same is now dismissed as to the defendant, Alexander B. Massey.

"This 15th day of December, 1944.

(s) Mac Swinford, Judge."

On December 18, 1944, the following stipulation was agreed to and the same was left with the United States District Court and filed by order of court December 20, 1944:

"Judge Marx:

"We move orally that the action against Ben Williamson be revived against Ben Williamson, Jr., and Davis Geiger, co-executors of the estate of Ben Williamson, deceased.

"STIPULATION

"1. The above motion having been made in open court, notice of the making of such motion and of the making of the motion orally is waived and Ben Wil-

liamson, Jr. and Davis Geiger, co-executors of the estate of Ben Williamson, deceased, having entered their appearance by their counsel for the purpose of opposing said motion and for no other purposes and by stipulation of the parties, it is agreed that the same may be heard on the oral motion without further notice or time.

"2. Ben Williamson, the defendant, died June 23, 1941.

"3. His will was probated July 28, 1941, and his estate is still open and undistributed.

"4. Revivor is sought by motion against Ben Williamson, Jr. and Davis Geiger, co-executors of the estate of Ben Williamson, deceased.

"5. A. M. Anderson, Receiver of the National Bank of Kentucky, did not know of the death of Ben Williamson until August 10, 1944, and after the two year period fixed by Rule 25 had expired.

"6. A. M. Anderson, as such Receiver, has brought actions against approximately five thousand defendants, and all told there were approximately six thousand shareholders of the BancoKentucky Company. Those shareholders lived in all parts of the United States and some of them in foreign countries, and during the years that the actions have been in progress many of them have changed their residence from one place to another, and Mr. Anderson has had a limited staff at his disposal, and it has been impracticable and, in fact, impossible to learn of the movements and residences and even the death of defendants, and without such knowledge he could not bring actions for revivor until after he learned of the death.

"7. It is agreed that Mr. Anderson has been diligent in the performance of his duty.

"8. Mr. Williamson was a resident of the City of Ashland, Boyd County, Kentucky, for more than forty years prior to his death, and was at the time of his

death a resident of the City of Ashland, Boyd County, Kentucky.

(s) Harry Kasfir,
Nichols, Wood, Marx & Ginter,
Counsel for A. M. Anderson,
Receiver, Plaintiff.
(s) LeWright Browning,
Counsel for Ben Williamson, Jr. and Davis Geiger, co-executors of the estate of Ben Williamson, Deceased."

On December 18, 1944, the following stipulation was agreed to and filed with the Clerk by order of court dated December 20, 1944:

"Judge Marx:

"We move orally that the action against James H. Kitchen be revived against Watt M. Prichard and Charles V. Kitchen, co-executors of the estate of James H. Kitchen, deceased.

"STIPULATION.

"1. The above motion having been made in open court, notice of the making of such action and of the making of the motion orally is waived and Watt M. Prichard and Charles V. Kitchen, co-executors of the estate of James H. Kitchen, deceased, having entered their appearance by their counsel for the purpose of opposing said motion and for no other purposes and by stipulation of the parties, it is agreed that the same may be heard on the oral motion without further notice or time.

"2. James H. Kitchen, the defendant, died October 14, 1941.

"3. His will was probated February 25, 1941 and his estate is still open and undistributed.

"4. Revivor is sought by motion against Watt M. Prichard and Charles V. Kitchen, co-executors of the estate of James H. Kitchen, deceased.

"5. A. M. Anderson, Receiver of the National Bank of Kentucky, did not know of the death of James H. Kitchen until August 10, 1944, and after the two year period fixed by Rule 25 had expired.

"6. A. M. Anderson, as such Receiver, had brought actions against approximately five thousand defendants, and all told there were approximately six thousand shareholders of the BancoKentucky Company. These shareholders lived in all parts of the United States and some of them in foreign countries, and during the years that the actions have been in progress many of them have changed their residence from one place to another, and Mr. Anderson has had a limited staff at his disposal, and it has been impracticable and, in fact, impossible to learn of the movements and residences and even the death of defendants, and without such knowledge he could not bring actions for revivor until after he learned of the death.

"7. It is agreed that Mr. Anderson has been diligent in the performance of his duty.

"8. Mr. Kitchen was a resident of the City of Ashland, Boyd County, Kentucky, for more than forty years prior to his death, and was at the time of his death a resident of the City of Ashland, Boyd County, Kentucky.

(s) Harry Kasfir,
Nichols, Wood, Marx & Ginter,
Counsel for A. M. Anderson,
Receiver, Plaintiff.

(s) LeWright Browning,
Counsel for Watt M. Prichard
and Charles V. Kitchen, co-executors of the estate of James H.
Kitchen, deceased."

On December 20, 1944, the following stipulation was agreed to and filed with the Clerk and noted filed by order of Court dated December 20, 1944:

"Judge Marx:

"We move orally that the action against John W. Kitchen be revived against Catherine C. Kitchen, executrix of the estate of John W. Kitchen, deceased.

"STIPULATION

"1. The above motion having been made in open court, notice of the making of such action and of the making of the motion orally is waived and Catherine C. Kitchen, executrix of the estate of John W. Kitchen, deceased, having entered her appearance by her counsel for the purpose of opposing said motion and for no other purposes and by stipulation of the parties, it is agreed that the same may be heard on the oral motion without further notice or time.

"2. John W. Kitchen, the defendant, died October 18, 1937.

"3. His will was probated October 25, 1937, and his estate is still open and undistributed.

"4. Revivor is sought by motion against Catherine C. Kitchen, executrix of the estate of John W. Kitchen, deceased.

"5. A. M. Anderson, Receiver of the National Bank of Kentucky, did not know of the death of John W. Kitchen until August 10, 1944, and after the two year period fixed by Rule 25 had expired.

"6. A. M. Anderson, as such Receiver, has brought actions against approximately five thousand defendants, and all told there were approximately six thousand shareholders of the BancoKentucky Company. These shareholders lived in all parts of the United States and some of them in foreign countries, and during the years that the actions have been in progress

many of them have changed their residence from one place to another, and Mr. Anderson has had a limited staff at his disposal, and it has been impracticable and, in fact, impossible to learn of the movements and residences and even the death of defendants, and without such knowledge he could not bring actions for revivor until after he learned of the death.

"7. It is agreed that Mr. Anderson has been diligent in the performance of his duty.

"8. Mr. Kitchen was a resident of the City of Ashland, Boyd County, Kentucky, for more than forty years prior to his death, and was at the time of his death a resident of the City of Ashland, Boyd County, Kentucky.

(s) Harry Kasfir,
Nichols, Wood, Marx & Ginter,
Counsel for A. M. Anderson,
Receiver, Plaintiff.

(s) LeWright Browning,
Counsel for Catherine C. Kitchen,
Executrix of the Estate of John
W. Kitchen, Deceased."

On December 18, 1944, the following order was entered:

"This cause coming on for hearing upon the suggestion of record of the deaths of the defendants Ben Williamson, James H. Kitchen, John W. Kitchen, Harry S. Swope, Frances H. Williamson, Rush W. Williamson, J. A. Sparks, Virginia K. Fitch, and John H. McCleary, and thereupon came the plaintiff and moved the court to revive this action against the personal representatives of the defendants, Ben Williamson, James H. Kitchen and John W. Kitchen, and said personal representatives having entered their appearance by their counsel for the purpose of opposing said

motion and for no other purpose, and having agreed that the same could be heard on oral motion without further notice of time, and said matters having been submitted to the court upon an agreed statement of facts, and the court being advised,

"It is considered, ordered and adjudged that said motions for revivor be, and the same are now, overruled, and that this action be, and the same is now, dismissed as to the defendants, Ben Williamson, James H. Kitchen, and John W. Kitchen.

"It is further ordered that this action be, and the same is now, dismissed as to the defendants Harry S. Swope, Frances H. Williamson, Rush W. Williamson, J. A. Sparks, Virginia K. Fitch and John H. McCleary.

"This 18th day of December, 1944.

(s) Mac Swinford, Judge."

On January 1, 1945, the following stipulation was filed:

"Judge Marx:

"We move orally that the action against William K. Massie be revived against Lucy Logan Massie, Executrix of the Estate of William K. Massie, Deceased.

"STIPULATION

"1. The above motion having been made in open court, notice of the making of such action and of the making of the motion orally is waived and Lucy Logan Massie, Executrix of the Estate of William K. Massie, Deceased, having entered her appearance by her counsel for the purpose of opposing said motion and for no other purposes and by stipulation of the parties, it is agreed that the same may be heard on the oral motion without further notice of time.

"2. William K. Massie, the defendant, died November 10, 1941.

"3. His will was probated November 14, 1941, and his estate is still open.

"4. Revivor is sought by motion against Lucy Logan Massie, Executrix of the Estate of William K. Massie, Deceased.

"5. A. M. Anderson, Receiver of the National Bank of Kentucky, did not know of the death of William K. Massie until June 9, 1944, and after the two year period fixed by Rule 25 had expired.

"6. A. M. Anderson, as such Receiver, has brought actions against approximately five thousand defendants, and all told, there were approximately six thousand shareholders of the BancoKentucky Company. These shareholders lived in all parts of the United States and some of them in foreign countries, and during the years that the actions have been in progress many of them have changed their residence from one place to another, and Mr. Anderson has had a limited staff at his disposal, and it has been impracticable and, in fact, impossible to learn of the movements and residences and even the death of defendants, and without such knowledge he could not bring actions for revivor until after he learned of the death.

"7. It is agreed that Mr. Anderson has been diligent in the performance of his duty.

"8. William K. Massie was a resident of the City of Lexington, Fayette County, Kentucky, for more than 50 years prior to his death, and was at the time of his death a resident of the City of Lexington, Fayette County, Kentucky."

(s) Harry Kasfir,
Nichols, Wood, Marx & Ginter,
Counsel for A. M. Anderson,
Receiver, Plaintiff.

(s) J. Ashlin Logan,
Counsel for Lucy Logan Massie,
Executrix of the Estate of William K. Massie, Deceased."

On January 1, 1945, the following order was entered:

"This cause coming on for hearing upon the suggestion of record of the death of the defendant, William K. Massie, thereupon came the plaintiff and moved the Court to revive this action against Lucy Logan Massie, Executrix of the Estate of William K. Massie, Deceased, and said personal representative having entered her appearance by her counsel for the purpose of opposing said motion and for no other purpose, and having agreed that the same could be heard on oral motion without further notice of time, and said matters having been submitted to the Court upon an agreed statement of facts, and the Court being advised,

"It is considered, ordered and adjudged that said motions for revivor be, and the same are now overruled, and that this action be, and the same is now dismissed as to the defendant, William K. Massie.

"This 1st day of January, 1945.

(s) Mac Swinford, Judge."

On March 12, 1945, the following notice of appeal was filed:

"Notice is hereby given that A. M. Anderson, Receiver of The National Bank of Kentucky, an insolvent national banking association, hereby appeals to the United States Circuit Court of Appeals for the Sixth Circuit from the order entered in this action on December 14, 1944, by Honorable Mac Swinford, District Judge, which order denied the motion of the plaintiff for revivor of this action against the defendant, Irvin Yungkau, Executor of the Estate of Albert Yungkau, deceased, and dismissed this action as to the defendant, Albert Yungkau.

"This appeal is taken by direction of the Comp-

troller of the Currency, a department of the Treasury of the United States.

(s) Harry Kasfir,
Nichols, Wood, Marx & Ginter,
Counsel for plaintiff, A. M. Anderson, Receiver, National Bank of Kentucky."

On March 12, 1945, the following notice of appeal was filed:

"Notice is hereby given that A. M. Anderson, Receiver of The National Bank of Kentucky, an insolvent national banking association, hereby appeals to the United States Circuit Court of Appeals for the Sixth Circuit from the order entered in this action on December 15, 1944, by Honorable Mac Swinford, District Judge, which order denied the motion of the plaintiff for revivor of this action against the defendant, Henry G. Sandifer, Executor of the Estate of Alexander B. Massey, deceased, and dismissed this action as to the defendant, Alexander B. Massey.

"This appeal is taken by direction of the Comptroller of the Currency, a department of the Treasury of the United States.

(s) Harry Kasfir,
Nichols, Wood, Marx & Ginter,
Counsel for plaintiff, A. M. Anderson, Receiver, National Bank of Kentucky."

On March 12, 1945, the following notice of appeal was filed:

"Notice is hereby given that A. M. Anderson, Receiver of the National Bank of Kentucky, an insolvent national banking association, hereby appeals

to the United States Circuit Court of Appeals for the Sixth Circuit from the order entered in this action on December 14, 1944, by Honorable Mac Swinford, District Judge, which order denied the motion of the plaintiff for revivor of this action against the defendant, H. E. Franz, Executor of the Estate of William R. Gilpin, deceased, and dismissed this action as to the defendant, William R. Gilpin.

"This appeal is taken by direction of the Comptroller of the Currency, a department of the Treasury of the United States.

(s) Harry Kasfir,
Nichols, Wood, Marx & Ginter,
Counsel for plaintiff, A. M. Anderson, Receiver, National Bank of Kentucky."

On March 12, 1945, the following notice of appeal was filed:

"Notice is hereby given that A. M. Anderson, Receiver of The National Bank of Kentucky, an insolvent national banking association, hereby appeals to the United States Circuit Court of Appeals for the Sixth Circuit from the order entered in this action on December 18, 1944, by Honorable Mac Swinford, District Judge, which order denied the motion of the plaintiff for revivor of this action against the defendant Lucy Logan Massie, Executrix of the Estate of William K. Massie, deceased, and dismissed this action as to the defendant, William K. Massie.

"This appeal is taken by direction of the Comptroller of the Currency, a department of the Treasury of the United States

(s) Harry Kasfir,
Nichols, Wood, Marx & Ginter,
Counsel for plaintiff, A. M. Anderson, Receiver, National Bank of Kentucky."

On March 12, 1945, the following notice of appeal was filed:

"Notice is hereby given that A. M. Anderson, Receiver of the National Bank of Kentucky, an insolvent national banking association, hereby appeals to the United States Circuit Court of Appeals for the Sixth Circuit from the order entered in this action on December 18, 1944, by Honorable Mac Swinford, District Judge, which order denied the motion of the plaintiff for revivor of this action against the defendants, Ben Williamson, Jr. and Davis Geiger, co-executors of the estate of Ben Williamson, deceased, and also denied the motion of the plaintiff for revivor of this action against the defendants, Watt M. Prichard and Charles V. Kitchen, co-executors of the estate of James H. Kitchen, deceased; and also denied the motion of the plaintiff for revivor of this action against the defendant, Catherine C. Kitchen, Executrix of the estate of John W. Kitchen, deceased, and which order further dismissed this action as to the defendants, Ben Williamson, James H. Kitchen, and John W. Kitchen.

"This appeal is taken by direction of the Comptroller of the Currency, a department of the Treasury of the United States.

(s) Harry Kasfir,
Nichols, Wood, Marx & Ginter,
Counsel for plaintiff, A. M. Anderson, Receiver, National Bank of Kentucky."

The following is a statement of points to be relied upon by the appellant upon appeal from the judgments:

"The defendant, A. M. Anderson, hereby relies upon the following points for reversal of the judgments en-

tered herein denying his motions for revivor and dismissing his action:

"1. The Court erred in denying the plaintiff's motion to revive;

"2. The Court erred in dismissing his petition as to the executors of the decedents named in the orders.

(s) Robert S. Marx,
(s) Frank E. Wood,
(s) Harry Kasfir,
Nichols, Wood, Marx & Ginter,
Counsel for A. M. Anderson,
Receiver of the National Bank of Kentucky."

On April 5, 1945, the following order extending time for filing record was entered:

"On application of the plaintiff, it is hereby ordered that the time in which the plaintiff may perfect his appeal from the orders of this Court denying revivors [which orders were entered on December 14, 1944 (Yungkau Estate), December 14, 1944 (Gilpin Estate), December 15, 1944 (Massey Estate), December 18, 1944 (Williamson, James H. Kitchen and John W. Kitchen Estates), and January 1, 1945 (Massie Estate)] by filing a transcript of record in the United States Circuit Court of Appeals for the Sixth Circuit, is hereby extended to and including the 5th day of May, 1945.

(s) Mac Swinford, Judge."

It is further agreed that the appeals taken by the Receiver may be prosecuted on one transcript of record.

It is further agreed that in view of the stipulation as to the record, no further stipulation or designation need be filed and that this shall comprise the record on appeal.

and it is further agreed that the Clerk may certify a copy of this stipulation as the record on appeal.

HARRY KASFIR,
NICHOLS, WOOD, MARX & GINTER,

Counsel for A. M. Anderson, Receiver, National Bank of Kentucky, Plaintiff.

H. R. DYSARD,

Counsel for Irvin Yungkau, Executor of the Estate of Albert Yungkau, Deceased.

R. D. DAVIS,

Counsel for H. E. Franz, Executor of the Estate of William R. Gilpin, Deceased.

J. ASHLIN LOGAN,

Counsel for Lucy Logan Massie, Executrix of the Estate of William K. Massie, Deceased.

LEWRIGHT BROWNING,

Counsel for Ben Williamson, Jr., and Davis Geiger, co-executors of the Estate of Ben Williamson, Deceased; Watt M. Prichard and Charles V. Kitchen, co-executors of the Estate of James H. Kitchen; Catherine C. Kitchen, Executrix of the Estate of John W. Kitchen, Deceased.

HENRY G. SANDIFER,
R. T. DICKERSON,

Counsel for Henry G. Sandifer, Executor of the Estate of Alexander B. Massey, Deceased.

CERTIFICATE OF CLERK

UNITED STATES DISTRICT COURT.
EASTERN DISTRICT OF KENTUCKY,

No. 4081.

I, Arthur B. Rouse, Clerk of the United States District Court for the Eastern District of Kentucky, hereby certify that the foregoing twenty-four pages contains a true, complete and correct transcript of the portions of the record which are included in a stipulation on file in my court, entered into between the parties as a stipulation as to record on appeal.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of said court at Covington, Kentucky, in the Eastern District of Kentucky, this 25th day of April, 1945.

A. B. ROUSE,
Clerk.

By MARY M. MCAFEE,
Deputy.

(SEAL)

United States Circuit Court of Appeals

SIXTH CIRCUIT

TRANSCRIPT OF PROCEEDINGS

CAUSE ARGUED AND SUBMITTED—December 4, 1945

(Before: Simons, Allen and Martin, Circuit Judges)

This cause is argued by Robert S. Marx for Appellant and by LeWright Browning for Appellee and is submitted to the Court.

JUDGMENT—Entered January 28, 1946

Appeal from the District Court of the United States for the Eastern District of Kentucky.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Kentucky, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

OPINION—Filed January 28, 1946

OPINION

Decided January 28, 1946.

Before SIMONS, ALLEN and MARTIN, Circuit Judges.

MARTIN, Circuit Judge. The appellant, Receiver of The National Bank of Kentucky, moved in the District Court to revive against the respective executors of seven defendants named in civil actions brought against them, while

alive, to recover stock assessments held lawful in *Anderson* v. *Abbott*, 321 U. S. 349. Each of the appellee executors had previously moved to dismiss the action, against his individual decedent, because not revived within two years after the death of the defendant.

The District Judge sustained the motions of the executors to dismiss and denied the motions of the receiver to revive the actions for the reason that, as he had stated in an earlier case, *Anderson* v. *Brady* (E. D. Ky.), 1 F. R. D. 589, the following language of Civil Procedure Rule 25(a)(1) is a mandatory restriction upon the exercise of discretion to extend the time for revivor beyond the two-year limitation: "If a party dies and the claim is not thereby extinguished, the Court within two years after the death may order substitution of the proper parties. If substitution is not so made, the action shall be dismissed as to the deceased party."

While expressing the opinion that Rule 6(b) serves a most useful purpose in enabling courts to prevent miscarriages of justice, the District Judge, nevertheless, held that the rule does not confer discretion to upset the definite limitation contained in Rule 25(a)(1). The appellant receiver contends that it does. Rule 6(b) provides: "When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may, at any time in its discretion (1) with or without motion or notice, order the period enlarged if application therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion permit the act to be done after the expiration of the specified period where the failure to act was the result of excusable neglect; but it may not enlarge the period for taking any action under Rule 59, except as stated in subdivision (c) thereof, or the period for taking an appeal as provided by law."

There is no factual controversy presented by this appeal. Indeed, the facts of record are stipulated. It is conceded that each of the seven decedents against whose estates revivors are sought died more than two years prior to the time the bank receiver made his motion to revive. The estates of five of the decedents are "still open and undistributed," the estate of one "is still open," and the estate of the seventh, Albert Yungkau, was "immediately delivered to the beneficiaries of his will."

It is stipulated that in each instance the appellant receiver had no knowledge of the death of the defendant shareholder until "after the two year period fixed by Rule 25 had expired." It is further agreed that the receiver has been diligent in the performance of his duty; that he brought actions against approximately 5,000 of the 6,000 shareholders of Banco-Kentucky Company who lived in all parts of the United States and some even in foreign countries; that many of these shareholders during the progress of the litigation changed their residences; and that with the limited staff at his disposal, it has been "impossible for the receiver to learn of the movements and residences and even the death of defendants, and without such knowledge he could not bring actions for revivor until after he learned of the death."

The appellant urges that Rule 6(b) "permits enlargement" in all cases when by the civil procedure rules an act is required to be done within a specified time, with the two exceptions stated in the rule, namely, the period for taking any action under Rule 59 concerning new trials, and the period for taking an appeal. It is contended that the specification of those two exceptions excludes the "engrafting" of any additional exception upon the rule. Appellant insists that the District Court erred in construing the words "the action shall be dismissed," used in Rule 25(a)(1), as preventing the revivor of the actions after the lapse of two

years from the date of the death of the respective defendants. He points out that the word "shall," though mandatory in character, is not to be so construed in every context. *Escoe* v. *Zerbst*, 295 U. S. 490, 493; *Railroad Company* v. *Hecht*, 95 U. S. 168; *West Wisconsin Railway Co.* v. *Foley*, 94 U. S. 100; *Richbourg Motor Co.* v. *United States*, 281 U. S. 528, 534.

Appellant concedes that "where the only question is the application of Rule 25(a), there is no discretion given the District Court to permit a revivor beyond the two-year period," but that "when the element of excusable neglect comes into play another rule [6(b)] permitting enlargement of time extends the power to the court to exercise his discretion." We do not concur in this interpretation of the rules. In our judgment, Rule 25(a)(1) has the same effect as a statute of limitation with respect to the revival of an action against the estate of a decedent. If an action is not revived within two years following the death of the defendant, a binding duty rests upon the court to dismiss the action. The language of the rule is clearly imperative. Prior to the adoption of Rule 25(a)(1), the period of limitation for reviving an action against the estate of a defendant was fixed by section 778 of the Judicial Code at two years after his death. No purpose is manifested to change the limitation period in the adoption of the civil procedure rule in question. On the contrary, the same limitation is written into the rule. If, within two years after death, substitution of the proper parties has not been made, the rule commands the court to dismiss the action against the deceased party.

"Excusable neglect" to revive an action within a period of definite lawful limitation is no more effective in avoidance of the bar than is the failure to bring an original action within the time limit fixed by statute. The Court is without jurisdiction to excuse "excusable neglect" in either

instance. Rule 25(a)(1) operates both as a statute of limitation upon revivor and as a mandate to the District Court to dismiss an action not seasonably revived by substitution of parties.

Rule 6(b) was not, to our thinking, intended to nullify the mandatory language of Rule 25(a)(1) so as to permit the District Court to enlarge the time within which parties can be substituted for the decedent. The rule would seem to be designed to afford relief to a party whose failure to take timely required steps might be properly classified as "excusable neglect"; but was not intended to apply to affirmative action demanded of the Court in plain words.

No directly applicable authority upon the issue presented has been cited by counsel or revealed by research, but *Wallace* v. *United States*, 142 F. (2d) 240, 244 (C. C. A. 2), bears analogy in principle. In that case, it was held that Civil Procedure Rule 6(b) does not apply to a motion for relief from a judgment or an order on the basis of mistake, inadvertence, surprise, or excusable neglect under Rule 60(b), for the reason that the time for making such motion is expressly limited in that rule to a period not in excess of six months after the entry of the judgment or order. Declaring that interpretative devices such as *expressio unius exclusio alterius* have diminished importance today and must yield to more obvious indications of intention, the opinion states: "The terms of Rule 60(b)—'but in no case exceeding six months'—are so emphatic as to preclude the importation of an exception via Rule 6(b)."

In *Winkelman* v. *General Motors Corporation*, 30 F. Supp. 112 (S. D. N. Y.), it was held that the substitution of a representative of a deceased party pursuant to the Judicial Code, 28 U. S. C. A., Section 778, and to Civil Procedure Rule 25, relating to substitution in the event of the death of a party, is *mandatory*. The District Court, therefore, dismissed the bills of complaint against the decedent and his executors for failure of the plaintiffs to revive the suit within the two-year period provided by law.

A few other cases have been cited which are not considered especially significant here. *Mutual Benefit Health & Accident Ass'n* v. *Snyder*, 109 F. (2d) 469 (C. C. A. 6); *Burke* v. *Canfield*, 111 F. (2d) 526 (D. C. App.); *Ainsworth* v. *Gill Glass & Fixture Co.*, 104 F. (2d) 83 (C. C. A. 3).

Being in our opinion correct, the judgment of the District Court is affirmed.

SIMONS, Circuit Judge (dissenting). With great regret I am unable to lend my concurrence to the opinion of the majority in this case. Rule 25(a) speaks in terms that are seemingly mandatory. Rule 6(b), however, permits the Court to enlarge the period after the expiration of two years "where the failure to act was the result of excusable neglect." The opinion considers it to be conceded that the neglect to reinstate the proceedings was excusable. Had the Rule ended there it would seem to me that the Court would be authorized to entertain a motion for enlargement of the time once excusable neglect had been established. The Rule, however, goes farther and provides exceptions, neither of which refers to Rule 25(a)(1); namely, it may not enlarge the period for taking any action under Rule 59 except as stated in subsection (c) or the period for taking an appeal as provided by law.

It is a well-established rule of statutory construction that where two provisions of a statute are in apparent conflict, the Court must endeavor to reconcile them. It is also a well-established rule that where specific exceptions are stated they exclude all others, and there are persuasive and authoritative adjudications to the effect that though the word "shall" is the language of command it is not controlling but only a "test significant," and the ends and aims of the statute must be consulted. *Essoc* v. *Zerbst*, 295 U. S. 490, 493; *West Wisconsin Railway* v. *Foley*, 94 U. S. 100.

The opinion reasons by analogy that the decision in *Wallace* v. *U. S.*, 142 Fed. (2d) 240; 244 (C. C. A. 2), requires that the word "shall" must, in its present context, be given its mandatory connotation, conceding, however, that that case does not reach the present problem. The *Wallace* case, however, construed Rule 60(b) and not Rule 25(a)(1). The pertinent language in that Rule was "but in no case exceeding six months." This phrase is so emphatic and specific as to preclude "the importation of an exception via Rule 6(b)." This emphasis on the exclusion of exceptions is not present in Rule 25(a)(1). In *Mutual Benefit Health and Accident Ass'n* v. *Snyder*, 109 Fed. (2d) 469 (C. C. A. 6), and *Burke* v. *Canfield*, 111 Fed. (2d) 526 (D. C. App.), excusable neglect was not shown but the Court nevertheless allowed the record to be filed under Rule 75(a), both cases holding that Rule 6(b) did not lift the time limit set down by section 73(g). In *Ainsworth* v. *Gill Glass and Fixture Co.*, 104 Fed. (2d) 83 (C. C. A. 3), it also was not shown that failure to permit a record to be filed was the result of excusable neglect. The Court, however, allowed the record to be filed under Rule 73(a).

Finally, the proposed revision of the rules not yet promulgated includes Rule 25 as an exception to Rule 6(b). This is done on the theory that the limit to substitution should be absolute. This leads me to the conclusion that the proposed revision of the rules contemplates a change in the rule rather than its clarification. I think the judgment should be reversed and the cause remanded for consideration of the plaintiff's suit upon its merits.

CLERK'S CERTIFICATE

UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SIXTH CIRCUIT

I, J. W. Menzies, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of Transcript of Proceedings for Certiorari Application in the case of *A. M. Anderson, Rec.* v. *Irvin Yungkau, Ex., et al.*, No. 10,005, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of said Court at the City of Cincinnati, Ohio, this 26th day of March, A. D. 1946.

Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 13, 1946

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Reed and Mr. Justice Jackson took no part in the consideration or decision of this application.